APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,293

THOMAS LAVELLA, *Appellant*

v.

W. A. BOYLE, ET AL

Appeal from the United States District Court
for the District of Columbia

Decided April 16, 1971

Mr. Robert C. Handwerk for appellant.

Mr. Harold H. Bacon, with whom *Messrs. Welly K. Hopkins* and *Joseph T. McFadden* were on the brief, for appellees.

Before WRIGHT, MACKINNON and WILKEY, *Circuit Judges.*

PER CURIAM: This is an appeal from the District Court grant of a summary judgment for the appellee Trustees of the United Mine Workers of America Welfare and Retirement Fund (1950).[1] Appellant is a retired coal miner who filed an application for pension fund benefits 13 March 1967. The Trustees denied the application on the ground that "appellant has not established proof of twenty (20) years' classified service in the coal industry within the thirty (30) year period immediately preceding the date his application was received," specifically, 13 March 1937 to 13 March 1967. The material and relevant facts do not appear to be in dispute, and the District Court therefore by summary judgment sustained the action of the Trustees. For reasons set forth hereafter, we reverse and remand for trial.

[1] The fund was created by the National Bituminus Coal Wage Agreement of 1950, as authorized by 29 U.S.C. § 186(c)(5) (1964).

The chronology of appellant's service in the coal mining industry is determinative of his rights here. Appellant, born 10 February 1912, worked for the Shawmut Mining Company or its successor from either August 1928 or August 1929 until 1952, by which time he had contracted such an advanced case of silicosis, the miner's disease commonly referred to as black lung, that he was permanently disabled. He did work part of the year 1953 in the mining industry on so-called "dead work," not inside the mines. He was hospitalized and received treatment which apparently benefited him, as he returned to work for a short period in 1955. By 10 February 1967 he met the age requirement for pension of 55 years and applied shortly thereafter.

Eligibility for pension fund benefits have been set from time to time by resolutions of the Trustees, beginning 5 April 1950. At the time appellant filed his application for fund benefits one of the relevant eligibility requirements read:

> Completed twenty (20) years' service in the coal industry as described in paragraph II A hereof, in the United States, within the thirty (30) years' period immediately preceding the date his application for pension is received at the office of the Trust Fund.

Pursuant to this criterion of eligibility, the pension fund Trustees calculated appellant's service as beginning 13 March 1937, giving him a solid base of unquestioned service through the year 1951, a total of 15 years. To this the the Trustees added the maximum credit allowable of four years, during which appellant Lavella received workmen's compensation. To this unquestioned 19 years the Trustees added a one-quarter year credit for the years 1952 and 1953, thus giving him a total of 19½ years' service credit in the 30-year period immediately preceding the receipt of his application. By the Trustees' calculation appellant thus fell short by one-half year.

By appellant's own calculation he had 20¼ years, picking up an additional ¼ year in 1953, in 1955, and possibly in 1956. There is no Social Security or other record of his having received wages in 1956, but in 1953 he did receive $16.66 in wages and in 1955 he received more than the sum calculated as one quarter's pay, but one quarter's credit was all that was allowed by the Trustees. However, we do not base our decision on the additional credit of the two quarters in 1953 and 1955, which would give appellant the full 20 years, but on his status in 1952 when he was forced to quit work because of his advanced silicosis. Lavella never worked anywhere except in the mining industry.

While the eligibility provision in 1967 was as quoted above, the proviso "within the thirty (30) years' period immediately preceding the date his application for pension is received" was only added in 1953. Therefore, prior to 1953, 20 years' service *at any time* would qualify an applicant for a pension. When appellant was permanently disabled by the black lung and unable to work after some time in 1952 (the undisputed record shows he worked one-fourth year and received workmen's compensation for three quarters of the year), appellant had completed between 23 and 24 years' service consecutively in the mining industry for the same company. He had thus completed all of the requirements for a pension except attainment of the age, then age 60, later reduced to 55.

Appellant did not leave the mining industry and work elsewhere, nor did he willingly retire to idleness. He was incapacitated from further work in the mining industry by that disease peculiarly attributable to the conditions under which he worked in the mines, *i.e.*, silicosis or black lung. In February 1954 he underwent a right middle lobectomy because of atelectasis of the right middle lobe, following which he had repeated attacks of respiratory infection with several episodes of bronchial pneumonia and pneumonitis.

He was declared disabled and eligible for pension under the Occupational Disease Act of Pennsylvania.

Under these circumstances, while we do not hold that the Trustees' action in 1953 in changing the eligibility standards to require that the 20 years' service in the coal industry must be within the 30-year period immediately preceding the date of application for pension was *per se* arbitrary or unreasonable;[2] nor do we decide its effect on those miners who had not completed 20 years' service by the date of this change in 1953, we hold here that a coal industry employee in the situation of appellant Lavella, who had accrued his 20 years' service prior to the imposition of this additional requirement, and whose failure to work the additional years prior to the age date of eligibility for his pension was due to permanent disability caused by the occupational disease endemic to the mining industry, had sufficiently vested rights in 1952 which could not be cut off by the change in eligibility requirements in 1953.[3]

---

[2] *See Roark* v. *Lewis*, 130 U.S.App.D.C. 360, 362, 401 F.2d 425, 427 (1968), where we held that the trustees' *interpretation* of a particular pension eligibility requirement was not arbitrary or capricious but remanded for the development of a record on the reasonableness of the requirement itself. Conversely, in the instant case, we find no fault with the eligibility requirement here involved, but view as unreasonable its application to the individual facts of appellant's case.

[3] We recognize that in *Kosty* v. *Lewis*, 115 U.S.App.D.C. 343, 347, 319 F.2d 744, 748 (1963), we declined to analyze a similar claim in terms of whether "vested" rights were involved. In *Kosty* the issue was whether the changed pension requirements could be invoked to cut of the rights of a pension of a miner who met all prior criteria for a pension except actual retirement from employment at the time the policy was changed. We stated there that:

> our interest . . . is directed to the reasonableness of the opportunity afforded to mature pension eligibility under current standards where all that is lacking is the actual termi-

We have carefully considered our recent decision in *Gaydosh* v. *Lewis* [4] and do not find it determinative of the respective rights of appellant and Trustees here. We found Gaydosh's claim to a pension suffered from two defects: (1) He had not worked in the coal industry for a four-year period from 1943 to 1947. The resolution of the Trustees changing the eligibility requirement to include service immediately preceding 29 May 1946 was not arbitrary and unreasonable and did not destroy any rights vested in Gaydosh at that time. (2) Gaydosh *retired voluntarily* at the age of 56. Gaydosh was in a position to continue work, and had he done so, when the eligibility requirements were later changed, he would subsequently have become eligible for a pension. Lavella had no choice; at the time the change which affected him was made, he was permanently disabled by miner's black lung. We pointed out in *Gaydosh* that "economic reality requires a reasonable cutoff date as to age lest the fund be exhausted by comparatively premature retirement. Pragmatically speaking, when a miner retires at the age of 56 and seeks to await the tolling of four years before filing for a pension, those years are productively carried by the sweat of the other miners. . . . [T]he absence of Gaydosh must mean a pro-

---

nation of employment, rather than debating whether such eligibility should be regarded in substance as already having been matured.

In the instant case, as we point out *infra*, appellant's opportunity to "mature" his pension eligibility, *i.e.*, to apply for and receive a pension upon reaching the required age, was unreasonably denied by the application of the new policy to his case, since he had met all the then extant requirements for a pension except age, and he was prevented by his physical condition from continuing to work in order to fulfill the additional condition for pension eligibility imposed by the changed policy. Our use of the term "vested" in these circumstances is merely a shorthand way of describing this situation.

[4] 133 U.S.App.D.C. 274, 410 F.2d 262 (1969).

portionate decrease in the worth of the fund."[5] Not so with appellant in the case at bar, who had completed all of his eligibility requirements before the change in the pension regulations to require service within 30 years immediately preceding retirement. And the appellant here did not voluntarily retire from the coal industry and await his attainment of age; he was permanently disabled by the disease endemic to this industry.

Had the appellant made a motion for summary judgment on the undisputed facts in the trial court, we would be in position to decide this case finally on this appeal. However, since appellant has not yet made a motion for summary judgment, we hereby reverse the grant of summary judgment for appellees and remand the cause for trial in the District Court.

So ordered.

---

[5] *Id.*, at 277, 410 F.2d, at 265.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

NATHAN J. PAULSON
CLERK

May 12, 1971

No. 24,293—*Thomas Lavella* v. *W.A. Boyle, et al*

Welly K. Hopkins, Esq.
Harold H. Bacon, Esq.
Joseph T. McFadden
907 15th Street, N.W.
Washington, D. C. 20005

Dear Gentlemen:

This is to inform you that your suggestion for rehearing *en banc* was transmitted to the full court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

Nathan J. Paulson
NATHAN J. PAULSON
Clerk

NJP/bja
cc: Robert C. Handwerk, Esq.

29 § 186—Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations

expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees whose are employed in an industry affecting commerce;

* * * * * * * * * * *

(c) The provisions of this section shall not be applicable

* * * * * * * * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;

* * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950
EFFECTIVE MARCH 5, 1950, TO JUNE 30, 1952
EXECUTED AT WASHINGTON, D. C., MARCH 5, 1950

* * * * * * * * * * *

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such

Fund by each operator signatory hereto the sum of thirty cents (30c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

In the event of a deadlock on the designation or agreement as to any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302(c) of the "Labor-Management Relations Act, 1947."

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of

this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to "United Mine Workers of America Welfare and Retirement Fund of 1950" and shall be delivered or mailed to the office of said Fund located at 907 Fifteenth Street, N.W., Washington, D. C., or as otherwise designated by the Trustees.

It is stipulated and agreed by the contracting parties hereto that an annual audit of the Fund hereinabove described shall be made by competent authorities to be designated by the Trustees of said Fund. A statement of the results of such audit shall be made available for inspection of interested persons at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

Failure of any Operator signatory hereto to make full and prompt payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any

mine to which this Agreement is applicable shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

Action which may be required hereunder by the Operators for the appointment of a successor Trustee representing them, or which may be required in connection with any other matter hereunder, may be taken by those Operators who at the time are parties hereto, and authorization, approval, or ratification of Operators representing fifty-one percent (51%) or more of the coal produced for use or sale during the calendar year previous to that in which the action is taken shall be sufficient and shall bind all Operators.

B. It is hereby stipulated and agreed by the contracting parties with respect to the Fund created by the National Bituminous Coal Wage Agreement of 1947:

(1) The Operators signatory hereto agree to make payments into said Fund on or before March 15, 1950, on account of all coal produced for use or sale up to and including March 6, 1950, with respect to which payment has not heretofore been made, such payments to be on the basis heretofore made by said Operators under the National Bituminous Coal Wage Agreement of 1947 and the National Bituminous Coal Wage Agreement of 1948, whichever is applicable.

(2) The Operators signatory hereto hereby renounce and forever release any and all claim to or interest in payments made into the said 1947 fund.

(3) The Trustees appointed pursuant to this Agreement are hereby authorized and directed to accept into the new trust fund hereby created and to devote for the purposes hereinabove specified and enumerated, any and all trust funds remaining unexpended or unobligated in said 1947 trust fund.

(4) The parties hereto agree that the best interest of the beneficiaries of said trust fund would be served

by having all unexpended or unobligated funds therein transferred as above provided, and agree that the Trustees thereof should transfer such funds to the new trust fund created by this Agreement.

C. It is stipulated, understood and agreed by the contracting parties hereto that the present practices with respect to wage deductions and their use for provision of medical, hospital and related services shall continue during the terms of this contract or until such earlier date or dates as may be agreed upon by the United Mine Workers of America and any Operator signatory hereto.

D. It is the intent and purpose of the contracting parties hereto that full cooperation shall by each of them be given to each other, the Trustees named under this Section and to all affected Mine Workers to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of this Fund.

Second Meeting of the Trustees, United Mine Workers of America Welfare and Retirement Fund of 1950, April 5, 1950

RESOLUTION No. 10

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement") other than those exempted from the 1950 Agreement; and

* * *

BE IT FURTHER RESOLVED, that the following regulations shall govern the payment of pensions of ONE HUNDRED DOLLARS ($100.00) per month to individual members of the United Mine Workers of America, and to employees of the

coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

An applicant shall be eligible for a pension if he meets the following requirements:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946.

C. Been employed for a period of at least one year in the Bituminous Coal Industry immediately preceding his retirement.

D. Completed twenty (20) years service in the Coal Industry in the United States, its possessions or territories, or the Dominion of Canada; a year of service being one in which applicant has for more than six months in any calendar year:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

Any applicant who meets all requirements of eligibility at any time after May 28, 1946, shall not be subsequently disqualified by returning to work in the Coal Industry for a period of less than one year.

21st Meeting 1-28-'53

RESOLUTION No. 30

PENSION

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement") other than those exempted from the 1950 Agreement; and

* * *

BE IT FURTHER RESOLVED, that effective January 29, 1953 the following regulations shall govern the payment of pensions of United Mine Workers of America, and to employees of the coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

An applicant shall be eligible for a pension if he has:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Completed twenty (20) years service in the coal industry in the United States, its possessions or territories, or the Dominion of Canada within the twenty-five (25) year period immediately preceding his application for pension; a year of service being one for which the applicant has:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry

and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

C. Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following a period of regular employment in the Coal Industry immediately preceding May 29, 1946; provided that if he had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension only upon the completion of twenty (20) years service in the Bituminous Coal Industry, and meets the other requirements of eligibility as contained in Paragraphs A and B and its sub-sections, subsequent to May 28, 1946.

* * *

22nd Meeting 3/13/'53

RESOLUTION No. 31

PENSION

BE IT RESOLVED, That the words and figures "twenty-five (25)" appearing in the fourth line of Paragraph I B of Resolution No. 30 be stricken and in lieu thereof the words and figures "thirty (30)" be inserted, to be effective as of January 29, 1953.

BE IT FURTHER RESOLVED, That Resolution No. 30 in all other respects remains unchanged and is in full force and effect.

Seventy-Eighth Meeting of the Board of Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, January 4, 1965

RESOLUTION No. 63

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to employees of coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from such agreement; and

* * *

WHEREAS, the Trustees desire to increase the amount of pensions heretofore paid from seventy-five dollars ($75.00) per month to eighty-five dollars ($85.00) per month, to reduce the age for pension eligibility from sixty (60) years of age to fifty-five (55) years of age effective February 1, 1965, and to permit miners who are employed in the coal industry on or after February 1, 1965, to receive credit for coal industry service for any twenty (20) years of coal industry employment prior to the date of application for pension;

* * *

BE IT FURTHER RESOLVED, That effective February 1, 1965, the following regulations shall govern the payment of pensions of eighty-five dollars ($85.00) per month to employees of employers signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

A. An applicant who subsequent to February 1, 1965, permanently ceases work in the bituminous coal industry as an employee of an employer signatory to the National Bituminous Coal Wage Agreement

of 1950, as amended, shall be eligible for a pension if he has:

1. Attained the age of fifty-five (55) years or over at the date of his application for pension.

2. Completed twenty (20) years' service in the coal industry in the United States, as described in paragraph II A hereof.

3. Permanently ceased work in the coal industry immediately following regular employment for a period of at least one (1) full year as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement, as defined in paragraphs II B hereof.

B. An applicant who, prior to February 1, 1965, had permanently ceased work in the bituminous coal industry, as an employee of an employer signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, shall be eligible for a pension if he has:

1. Attained the age of fifty-five (55) years or over at the date of his application for pension.

2. Completed twenty (20) years' service in the coal industry as described in paragraph II A hereof, in the United States, within the thirty (30) years' period immediately preceding the date his application for pension is received at the office of the Trust Fund.

3. Permanently ceased work in the bituminous coal industry after May 28, 1946, following regular employment as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement, and having been regularly employed in a classified job in the coal industry immediately preceding May 29, 1946.

C. An application who could have qualified for a pension under paragraph I B hereof, had he not worked beyond February 1, 1965, or an applicant who at any time after February 1, 1965, could have permanently ceased work and qualified for a pension under paragraph I A hereof, at age fifty-five (55) or over but continued to work in the coal industry, shall not be required to work one (1) full year immediately preceding permanent cessation of work so long as his only subsequent employment in the coal industry is as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement.

• • •

Year	Claimed	Required Earnings	SSA Earning in coal Industry	Cr. possible per SSA	Service Certified By: Co. Stat.	Service Certified By: 14-P	Service Certified By: Other	Credit Established	Miscellaneous Information — Why No Credit & Etc.
									20/30 Years - 3/13/37 To 3/13/67
1937	1	567	1300 +	1		2-P		1	
1938	1	486	1100 +	1		2-P		1	
1939	1	534	1400 +	1		2-P		1	
1940	1	606	1980 +	1		2-P		1	
1941	1	729	1800 +	1		2-P		1	
1942	1	861	2000 +	1		2-P		1	
1943	1	1,002	729.79 C	3/4		2-P		1	In Military Service OK for Full Credit
1944	1	1,182	965.55 C	3/4		2-P		1	7-23-43 To 2-28-44
1945	1	1,257	2100 +	1		2-P		1	
1946	1	1,191	2200 +	1		2-P		1	
1947	1	1,457	1800 +	1		2-P		1	
1948	1	1,470	2400 +	1		2-P		1	
1949	1	1,103	1900 +	1		2-P		1	
1950	1	1,338	2500 +	1		2-P		1	
1951	1	1,646	1700 +	1		2-P		1	
1952	1	1,565	361.69 C	1/4		2-P		1	
1953	1	1,743	16.66 C	0		2-P		1	Credit For W/C Award - 4 Years Maximum Credit
1954	0	1,661	—	0				1	
1955		1,958	616.36 C	1/4				1	
1956		2,145	—	0				1/2	
1957		2,238	—	0				0	
1958		2,185	—	0				0	
1959		2,261	—	0				0	
1960		2,316	—	0				0	
1961		2,340	—	0				0	
1962		2,413	—	0				0	
1963		2,486	—	0				0	
1964		2,813	—	0				0	
1965		2,835	—	0				0	
1966		2,957	—	0				0	
1967	0	2,984	—	0				0	
1968	—			—				—	Maximum Credit Given -
1969	—			—				—	Based On Information And
1970									Evidence In File.

C Exact Earnings For SSA

Total 17 + W/C - 4 Year Maximum Credit Possible

Total 15

Total 19 1/2

19 1/2
Total Certified

P-10 (Rev.2-27-69)

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND
907 FIFTEENTH STREET, N. W. WASHINGTON, D. C. 20005

Application for Pension

By filing this application, no rights accrue to the applicant until the benefit is authorized for payment. The burden of proving eligibility for this benefit is on the applicant.

QUESTIONS MUST BE ANSWERED—FAILURE TO DO SO WILL DELAY PROCESSING

1. District 2 Local Union No. 2324 Date 2-15-1967

2. Name (Print) THOMAS (First) A (Middle) LAVELLA (Last)

3. Social Security Number 1 2 2 0 5 2 1 8 7

4. Address (Street and Number) KERSEY (City) PENNA-15 (State)

5. Date of Birth 10 (Month) 11 (Day) 1912 (Year) Place of Birth KERSEY

Proof of age must be attached to this application. See attached information sheet for type of proof required.

6. Name of Father ANTHONY (First) LAVELLA (Last) Place of Birth Italy

7. Name of Mother ESTHER CARRABBE (First) (Maiden) Last Place of Birth Italy

8. Name of Wife, if living (First) (Middle) (Last) Age

9. Number of Children under 18 years of age

10. Have you permanently ceased working in the coal industry? ☑ Yes ☐ No

If you have not permanently ceased working, your application will be processed, but if you are found eligible, pension payments cannot begin until you submit to the Fund a Certificate of Retirement form which will be mailed you.

11. Name of last employer in the coal industry SHAWMUT MINING CO. (List your present employer if you are currently working)

Date you began working for this company Aug 1929 Date you last worked [illegible]

Type Work MINER

Reason for Retiring Sick

12. Did you ever receive an award for Workmen's Compensation because of a mine injury or silicosis?

☑ Yes ☐ No

If "Yes", a copy of the award should be submitted with this application if you wish credit.

Form 24-P (Rev. 2-1-65)

WHEN FILLED OUT PLEASE SEND YELLOW AND WHITE COPIES TO U.M.W.A. DISTRICT OFFICE

BEST AVAILABLE COPY.

13.

EMPLOYMENT RECORD.

List below all your employment in the coal industry, starting with the company you first worked for.

If you served in the Armed Forces during a war or national emergency and wish credit for this period, list the branch of service and the dates served. Also attach a copy of your Discharge.

From Mo.	From Yr.	To Mo.	To Yr.	Name of Coal Company	Location of Coal Company Town	Location of Coal Company State	Mine No.	Local Union No.	Type Work
Sep	1932	Aug	1933	Stearns Mining Co.	Brampton	Ky	5	2227	Miner

14. Were you ever connected with the management or operation of any of the coal companies where you have been employed or did you ever have any financial interest in any company?

Yes ____ No ____

15. If "Yes", indicate below the name of the company or companies and the period involved.

NAME OF COMPANY	FROM (month, year)	TO (month, year)

CERTIFICATION BY APPLICANT

Any person, who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure for himself or for any other person a Fund benefit, shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such false statements or omission of such information, the recipient of benefits will be required to reimburse the Fund in the amount received from the Fund.

(If signature is made by mark (X) two witnesses who know the applicant must sign.)

_____ *(Witness)*

_____ *(Witness)*

I certify that the statements made by me in this application are true and correct and that I have listed all of my employment in the coal industry.

Applicant sign here [signature] *DO NOT print or stamp*

CERTIFICATE OF LOCAL UNION

This is to certify that the above applicant is currently a member of Local Union No. 2179 and has been a member of this Local Union since ____ / ____ / 1952
Month *Day* *Year*

LOCAL UNION SEAL

[signature] 2-16-62
Signature of L. U. Officer *Date*

[signature] 2-27-62
Signature of L. U. Officer *Date*

CERTIFICATE OF DISTRICT

This is to certify that applicant is a member of District No. ____, United Mine Workers of America

_____ _____
Date *Authorized District Signature*

T AVAILABLE COPY

SUPPLEMENTAL EMPLOYMENT RECORD

Quarters Ending		Employer	I.D. No.	Kind of Work
From	To			
3/55	12/55	New Shawmut Mining Co.	2279	Car Dropper
6/55	9/55	Perry & Van Slander Coal Co.	2279	Car Dropper

NOTE: Letter and Statement on Form N.SM.-EE 2000 6-59 D.P. from New Shawmut Mining Company, St. Marys, Pa., herewith enclosed explains item one above.

As to Perry & VanSlander Coal Co. - they are no longer in existence, however, an employee of their's with whom I worked at the time I was employed by this Company is still living and his name and address is:

Mr. Fred Swanson,
Dagus Mines,
Elk County, Pa. 15831

If you deem it necessary I can obtain an affidavit from him verifying my employment with Perry & VanSlander Coal Company.

AS TO any employment with New Shawmut Mining Company in 1954 - I always was an employee of this Company but during this period I was ill therefore the reason that no wages were reported by this Company for me during this period. The reason I did not report and failed to claim the above two Companies during 1955 on my Pension Application - I felt I had sufficient time to warrant my application without the need of 1955.

File No. 1h0219

A39

SIGNATURE [redacted]

Dated May 2, 1967
Kersey, Pa. 15846.

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington, D. C. 20005

File No. 140219
Name LAVELLA, Thomas
District No. 2
Local Union No. 2279

Denial of Pension.

The application of Thomas Lavella
Address Kersey, Pennsylvania 15846

Is hereby denied for the following reason:

Applicant has not established proof of twenty (20) years' classified service in the coal industry within the thirty (30) year period immediately preceding the date his application was recived at the Fund—March 14, 1937 to March 13, 1967.

Applicant claims no employment in the coal industry during 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967; no credit can be given for these years. Based on evidence in Trust Fund files, applicant did not work regularly in the coal industry during 1943, 1944; only part credit was given for these years.

It is noted applicant was authorized Workmen's Compensation Benefits as a result of a silicosis award. Pursuant to Trustee regulations, he has been given the maximum credit of four years for the Workmen's Compensation Award he received. However, it is not sufficient to establish that he meets the requirement set forth above.

Date: May 10, 1967

DLM: ISR:ppm

By /s/ DONALD L. MCFARLAND
Review Unit, Pension Benefits

(Filed June 11, 1971)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25973

HANDEE T. LEE, *Plaintiff-Appellee,*

v.

ROBERT NESBITT, JAMES J. MARTIN, JOSEPH CURRAN, and all others who are Trustees of the National Maritime Trust, *Defendants-Appellants.*

Appeal from the United States District Court for the Western District of Washington Northern Division

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

KOELSCH, Circuit Judge.

Lee commenced this action in the District Court against the Trustees of the National Maritime Union Pension Trust, seeking a judgment declaring invalid one of the rules prescribing eligibility requirements for a retirement pension, specifically the "break-in-employment" rule (hereinafter "the rule"), and further declaring him to be entitled to a pension. Federal jurisdiction was based on the diversity of citizenship of the parties. *Dersch* v. *United Mine Workers Welfare and Retirement Fund,* 309 F. Supp. 395 (S.D. Ind. 1969). Both parties made motions for summary judgment, the Court granted Lee's and this appeal followed.

The National Maritime Union Pension Trust (hereinafter "the Trust") was established by the National Maritime Union in 1953, pursuant to § 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)(1964)), to provide pensions for the benefit of unlicensed seamen members. As required by that section, the Trust is administered by an equal number of employer and employee representatives, as trustees, for the benefit of those seamen whose employers contribute to

the Trust fund. Under the Trust provisions, the trustees are vested with discretion to establish requirements governing eligibility for benefits and to determine questions of eligibility.

In 1967, when Lee applied for a pension, a seaman, to be eligible, was required to be at least 60 years of age and to have worked a minimum of 15 years in covered employment —defined as employment with a contributing employer. However, the rule, in effect, added a further requirement concerning continuity of employment; it provided: "If a person does not work in Covered Employment for at least 200 days in any period of three consecutive calendar years after January 1, 1953, it shall constitute a break in employment and his previous pension credits shall be cancelled."[1] The trustees denied the application on the ground that Lee had suffered a break in employment in the period 1955-1957; they also declared he had forfeited all his credits prior to 1957.[2]

In the district court Lee conceded that he had not worked 200 days during the period 1955-57 and indeed his affidavits showed that he had worked 81 days in 1955 and 106 days in 1957, but not at all in 1956. Thus during the period he had worked a total of only 187 days or 13 short of the required 200. However, he excused the deficiency by the further assertion that no employment was available in 1956 and that the break was involuntary. He took the position that the rule was unreasonable on its face because of the absence of a proviso staying its operation whenever employment was unavailable; in the alternative he urged that the trus-

[1] The rule has since been changed to require at least 300 days of employment during three year periods.

[2] Lee had credit for 17½ years of covered employment before 1955 but on that date he had been ineligible to retire because of lack of age; although he had worked continually after 1957, he had accumulated only 8¼ years of new credits before he reached the age of 65.

tees acted arbitrarily when they refused to imply such a proviso and denied him a pension. The district court held the rule to be reasonable, but the trustees' interpretation of it to be arbitrary.

Section 302 requires that a pension trust be "for the sole and exclusive benefit of employees." The trustees of such a trust, while possessing a large measure of discretion in prescribing conditions of eligibility for benefits, owe a fiduciary duty to the employees and may neither impose unreasonable conditions of eligibility nor act arbitrarily in determining who is eligible. *Roark* v. *Lewis,* 401 F.2d 425 (D.C. Cir. 1968), *adhered to sub nom. Roark* v. *Boyle,* — F.2d — (D.C. Cir. 1970). Lee does not question the reasonableness of the rule so far as it eliminates from pension coverage those seamen-employees who voluntarily choose not to maintain a continuity of employment. But he contends that the rule is unreasonable on its face because it also operates whenever a break is involuntary. This contention is too far reaching. Since the trust is solely funded by employers' contributions, the amounts of which are determined by the number of days an employee works in covered employment, denial of benefits can reasonably be rested upon an insufficiency of years of employment regardless of the reason. Thus, even if an employee, through no fault of his own, is prevented from completing a minimum period of employment, he may be denied a pension. *Stasukonis* v. *Kennedy,* 387 Pa. 216, 127 A.2d 678 (1956).

However, that is not this case. Here the trustees presumptively calculated that the 15 year work period would produce sufficient employer contributions to fund an employee's pension. Lee had worked in excess of that length of time without interruption. He was then entitled to a pension save for the fact that he had not yet reached retirement age. But if, before reaching that age, he was unable to thereafter find sufficient work, despite reasonable efforts, the rule would prevent him from ever receiving those benefits. We conclude that the rule, to the extent that it pro-

hibits benefits to an employee solely because of an involuntary interruption in employment after the completion of his minimum employment requirement and before reaching retirement age, is unreasonable on its face.

Our consideration of the matter cannot end here, however, for the trustees have advanced arguments which they assert justify the rule. In particular, they argue that the purposes of the trust compel this seeming unfairness. Pointing out that the American Merchant Marine is an industry of fluctuating but declining employment opportunities, the trustees argue, in effect, that the rule is calculated to induce competent employees to remain in the industry; to that end, pension benefits are limited to those who can always keep their jobs. We agree that these purposes justify the operation of the rule when an involuntary break in employment occurs before the employee has accumulated credit for 15 years of employment, but again, that is not this case. The employee who, prior to an involuntary interruption in his employment with contributing employers, has worked in the industry for 15 years, has surely demonstrated his work ability. Merely because he is unable to obtain employment due to the temporary unavailability of jobs does not establish that his services are no longer available to or needed in the industry. The operation of the rule in cases such as this one tends to thwart the trustees' stated purposes and, in fact, offers qualified seamen no incentive to stay in the industry.[3]

In sum, we conclude that the rule is unreasonable and hence invalid to the extent that it requires forfeiture of

---

[3] Contrary to appellants' assertion, § 302 trust agreements generally differentiate between voluntary and involuntary breaks in employment insofar as the effects on accumulated credits for prior services are concerned. When the break is due to lack of jobs, credits are preserved; but they are lost when the employee quits. Multi-employer Pension Plans Under Collective Bargaining, Dept. of Labor, Lab. Bulletin No. 1362, p. 69 .(1960). See Zining v. Retirement Fund of Fur Mfg. Industry, 42 Lab. Cas. 17012 (N.Y.S. Ct. 1961).

employment credits in the case of an employee who has accumulated the minimum number of credits to entitle him to a pension and then, due to unavailability of covered employment, suffers a break in employment during the interval remaining before his retirement.[4]

As to Lee, however, there remain issues of fact to be resolved before a judgment can be rendered. The district court, on the basis of Lee's affidavit that he was unable to secure any covered employment in 1956, concluded that Lee was prevented from working at least 200 days during the whole period 1955-1957. Obviously this conclusion is erroneous.[5] We must therefore return the matter to the district court where the issue can be resolved. On Lee will rest the burden of proof.

The judgment is vacated and the matter is remanded to the district court for further proceedings consistent with this opinion.

---

[4] Having so concluded it is unnecessary to determine whether the trustees' actions were or were not arbitrary.

[5] Fed. Rules Civ. Proc., Rule 56(d) provides that the district court on motion for summary judgment may by order declare settled specific facts that "appear without substantial controversy." However, the record here does not indicate a lack of controversy with respect to work availability in any of the three years, nor does the court's opinion reveal an intention to make such a determination.